## APPENDIX A.

### Opinion of the Court of Appeals.

IN THE COURT OF APPEALS.

STATE OF OHIO, EIGHTH DISTRICT,
CUYAHOGA COUNTY.

No. 16,908.

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RAY RITTER,
*Plaintiff-Appellant,*

vs.

MILK & ICE CREAM DRIVERS AND DAIRY EMPLOYEES UNION, LOCAL NO. 336, *et al.*,
*Defendants-Appellees.*

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OPINION.
January 2, 1940.

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LIEGHLEY, *J.*:

The evidence reduced to writing with all exhibits is before this Court. Any attempt to summarize the same would require the number of pages contained in one of the main briefs. There can be little dispute about what the evidence is. Sharp conflict arises over what inferences may reasonably and logically be drawn, what fair and reasonable conclusions may be and should be deduced therefrom, and what construction should be placed upon the whole situation as established by the evidence. What was the ultimate object and purpose of all the negotiations, of all the acts, words and deeds said and done or not said and done by each and all of the parties hereto as disclosed by the evidence or reasonably inferred therefrom. The proper answer to this inquiry will solve this problem.

It is the contract of October, 1937, involved herein, executed by the Union as one party, and the Milk Dealers, as the other,—each dealer signing a separate but like contract with the Union. Plaintiffs, Brokers, seek an order nullifying this contract, upon the claim that it is the result of a conspiracy between the Union and the Milk Dealers to fix prices, to eliminate competition, to create a monopoly, and put the plaintiff Brokers out of business. To sustain their claim, the plaintiffs depend for the most part upon the minutes of a large number of meetings held over a period of weeks by the Committees of the Union and the Dealers, which minutes appear to record the remarks, comments, demands and arguments of the members of the Committees. Their differences, whether genuine or otherwise, through the negotiations evidenced by the minutes of these meetings, finally were adjusted in manner and form as expressed by the written contract involved in the litigation.

The Brokers are independent operators. They own their own equipment and buy their milk supply already bottled and capped at the platforms of the dealers and then peddle the same on their own respective milk routes established by each Broker.

The Union demanded, and the contract provides that the Union shall deliver all milk of the dealer signing said contract with the Union. The Brokers say this cuts off their supply of milk, and doubtless does close the door of such contracting dealer to all Brokers, but does not close the door of any Dealer not under contract with the Union, nor any other source of supply than Dealers under such contract. But the Brokers say that all are under contract and the result is no milk supply obtainable or available to them and they are out of business.

The contract provides for a "closed-shop," the handling and delivery of the entire milk supply of a Dealer by Union members and wages of milk drivers paid upon a commission basis. It is said that the Union demanded a closed-shop and a standardized weekly or hourly wage.

The Dealers insisted upon the commission method of pay. The Union agreed to the latter only upon condition that it handle or deliver the whole supply of the Dealer, to eliminate thereby the ever-present competition of the Broker receiving his milk from the Dealer who at the same time has Union drivers on the streets delivering milk on the Dealer's account with routes overlapping those of the Brokers.

The Union insisted that if pay shall be by commission, the employer should not create competition for the employee, by delivering milk to the Broker with the same labels on the bottles, the same color scheme on the wagon, the driver with like regalia, and thus create an ideal setup for price cutting at the expense of wages by commission.

But the Brokers say all these alleged attempts to negotiate by the Union and the Dealers amounts to nothing more or less than a staging or make-believe with a real underlying design and unlawful primary purpose of getting rid of Brokers. While no one qualified or authorized says so, the only reasonable inference from what was said and done, it is claimed clearly establishes that such was their nefarious design and scheme.

Certain it is, that if the Union and Dealers were jointly intending and conniving to get rid of the Brokers as their chief objective, and these many meetings of their Committees had and held over a period of weeks were merely pretended or secondary considerations to give legal coloring to their prime objective, the performance of this contract should be enjoined.

If, however, there existed at that time, real substantial controversies in the milk industry between the Union and the Dealers, which called for adjustment and settlement to avoid imminent economic strife and threatened strike, and such was the outstanding paramount objective of the contending parties dealing adversarily, then the performance of this contract should not be enjoined, even though

the result be that the sources of milk supply from these dealers to these Brokers be terminated.

The principle of the closed-shop has become a recognized legal status to be attained through negotiations between Employer and Employee. Seldom does a large factory or industry establish a closed-shop that there are not some victims strewn along the pathway—victims in the sense that the sphere and opportunities of employment to the non-union man are restricted or extinguished. Unlawful conspiracy cannot be and should not be inferred from the fact alone that some Brokers are without milk supply as a result of a closed-shop contract between the Union and Dealers, negotiated and executed in adjusting their labor relations. Many a former profitable corner grocery and drug store has been annihilated in the evolution and growth of the chain stores. It seems to be the order of the day.

The right of collective bargaining between Employer and Employee is recognized and established at present in our industrial activities with respect to wage, hours and working conditions. It is recognized and encouraged even by high authority.

With the right to insist upon a closed-shop contract, and the right to bargain as to wages, it is doubtful if anyone would challenge the legality of this contract but for the seeming calamity to the Brokers. Of course, the Brokers may sell their equipment and routes, or they may seek other sources of supply, or join the Union and drive and sell for the Dealers direct. It should be noted that this contract makes no reference to Brokers. Their misfortune is a mere incidental consequence, if the contract be otherwise legal.

A thoughtful consideration of all the facts and circumstances of this case compels the inescapable conclusion that the plaintiffs have not sustained their burden of proof. The inferences and conclusions drawn have the element of plausibility but fall short of establishing the probability of their claims.

On the other hand, the claims of the defendants that this contract expresses the terms of settlement of a genuine labor dispute, adversarily negotiated and concluded, seem to be supported by the greater weight of the evidence.

It is our opinion and judgment that real disputes existed when the Union, in August, notified the Dealers that their contract would not be renewed. There was dissatisfaction with the wage schedule, calling for readjustment in the minds of the employees. When the employers stood firmly for wages on commissions, the demand that the Union deliver all the milk of the Dealer in order to protect his wage, became a proper factor or item for collective bargaining. This contract was the result of the contentions and demands of opposing forces. The primary objective was the solution of economic differences between the Dealers and the Union to avoid a calamitous strike in the milk industry, and all the hardships and suffering that would ensue.

It was said that many Dealers do not want this contract, which, if true, is not controlling. They signed the contract. Doubtless some members of the Union would prefer some other form of contract. In collective bargaining, the majority rules.

It was said that some of the larger Dealers do not sell to Brokers, but that they keenly desire the Brokers eliminated in order to get the sale of thirty thousand (30,000) quarts of milk per day now disposed of by Brokers. Of course, there is little substance to this argument for the obvious reason that the present purchasers from Brokers will decide from whom they will buy when the Brokers abandon their routes, whether from the larger or smaller dealers.

It is our conclusion that Section XXV of the contract is not a price-fixing but purely a wage-fixing provision. It is an attempt to standardize the wages at a uniform rate for the drivers, dependent to some extent upon the

energy and industry of the individual driver. The Dealer may sell his product for whatever price he chooses without any restriction or limitation imposed by this Section, but the wages are calculated upon a uniform and fixed basis.

The Brokers insist there was a conspiracy between the Union and the Dealers with the unlawful purpose and plan to get rid of Brokers. If it was the wish of the majority of the Dealers, motivated by a conviction that it would be for the best interests of their business, it would seem feasible to accomplish this end by agreement among themselves not to sell to them, without joining in an unlawful combination with the Union. If the desire originated with the Union and by it insisted upon, as it did, then the matter was a lawful subject for inclusion in the list of subjects of collective bargaining to the extent that the activities of the Brokers rendered insecure and uncertain the amount of their pay by commission.

In short, and finally, the misfortunes of the Brokers are but the incidental result of the terms of a contract between the Dealers and the Union, entered into in settlement of a labor controversy by bargaining at arm's length and the consequences to these brokers are not unlike those experienced among others under similar circumstances in other labor disputes.

The conclusion is that injunctive relief should be denied, and the petition dismissed at costs of the plaintiffs.

Exceptions may be noted.

TERRELL *P.J.*, and MORGAN *J.* concur.

# In the Supreme Court of the United States

**OCTOBER TERM, 1940.**

## No. 354.

RAY RITTER, *et al.*,
*Petitioners,*

vs.

MILK AND ICE CREAM DRIVERS AND DAIRY EMPLOYEES UNION, Local 336, *et al.*,
*Respondents.*

## MEMORANDUM OF RESPONDENT, THE TELLING-BELLE VERNON COMPANY, RE PETITIONERS' MOTION TO DISPENSE WITH PRINTING PORTIONS OF THE RECORD.

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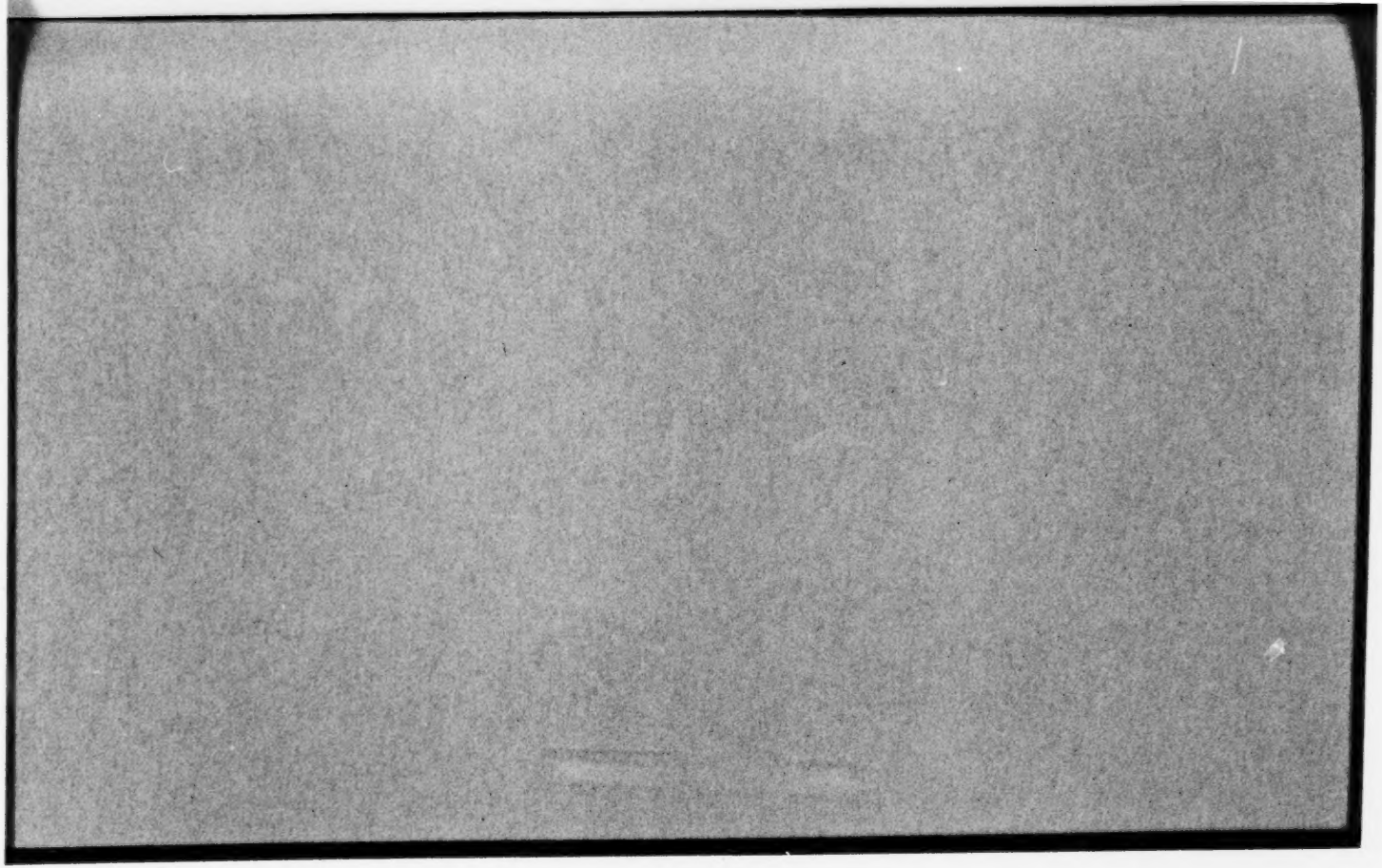

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**MEMORANDUM OF RESPONDENT, THE TELLING-BELLE VERNON COMPANY, RE PETITIONERS' MOTION TO DISPENSE WITH PRINTING PORTIONS OF THE RECORD.**

The petitioners have filed their motion in this Court, seeking to condense the Record which is to be printed. This motion contains various allegations as to the unwillingness of this respondent to stipulate for the condensation of the Record, which this respondent denies.

The crux of the case is a question of fact, namely, the primary purpose or intent of the defendants in negotiating an employment contract. Everything which was said by any of the defendants in these negotiations is contained verbatim in Exhibits 5-A to 5-U inclusive, so that these exhibits are, in the final analysis, the accurate and complete source from which this question of fact should be determined rather than the excerpts from these exhibits culled by the petitioners and read into the Record.

Despite this, and for the purposes of economy, this respondent hereby stipulates that the following may alone be printed as the Record to be used by this Court:

1. Petition and amended petition of the Petitioners filed in the Court of Common Pleas and Court of Appeals; answers thereto of this respondent, The Telling-Belle Vernon Company, and of the respondent Union; reply of the petitioners; transcript of the docket and journal entries in each of the State Courts and the opinions rendered by each of the State Courts.

2. Petitioners' (plaintiffs-appellants) Exhibit I, being the notice of Fairmont Creamery to brokers; Exhibit 2, being the form of contract negotiated in the fall of 1937; and respondent Union's Exhibit A, being the form of contract demanded by the Union prior to negotiations in the fall of 1937.

3. The Narrative Statement of Evidence filed by petitioners but amended and supplemented as set forth below:

Narrative Statement Page No.

3—Second paragraph, third sentence—to read: "The Union presented the dairies with a form of contract before negotiations were commenced." (R. 322.)

Second paragraph, fourth sentence to read: "He stated that this first contract in August 1937 specified different hours than the contract finally negotiated by the committees." (R. 323.)

Last paragraph, next to last line to read: "who has no building and plant and bottling." (R. 327.)

4—Change last sentence to read: "If the brokers were eliminated from competition, their customers would obtain their supply elsewhere and The Telling-Belle Vernon Company would possibly get its share of those customers and of the business thus lost by the brokers, and it would continue its existing efforts to obtain such business." (R. 339.)

6—Sixth line from top—insert the following sentence: "The Telling-Belle Vernon Company is affected by

brokers only to the degree that competition by every other dealer affects it." (R. 348.)

Change the first sentence of the second paragraph to read: "The witness denies that the brokers are price cutting, but, being asked to assume that they are price cutting, states that, based upon this assumption, their elimination would tend to stabilize the industry." (R. 350.)

7—Add at the end of the first paragraph the following sentence: "The committee of dealers had no authority to obligate any dairy." (R. 363.)

Second paragraph, fourth line—add the following sentence: "The committee members at these meetings discussed primarily the contract which the Union had presented. Any discussion of other subjects was a mere incident." (R. 365.)

Last paragraph, first line—change to read: "In October, 1937, the Union insisted that its contract containing demands for wages * * *." (R. 366.)

Last paragraph, next to the last line—add to the sentence "The incentive is thus greater" the following: "and the driver will be more certain to make collections for the milk sold." (R. 368.)

9—Sixth line from end of Jones' direct testimony—change to read: "The contract was thereafter presented by the Union and signed by The Telling-Belle Vernon Company." (R. 382.)

11—Eliminate everything from the sentence beginning on the ninth line from the end of the page to the cross examination of C. L. Dilts beginning on page 12, and substitute the following: "There was a discussion during these meetings concerning the brokers, and the witness believes that some person, whose identity he cannot recall, stated that the brokers were not good for the business, but is unable to testify that any statement was made in the joint meetings of the two committees that the brokers should be definitely eliminated, but such a statement might have been made by some member

of the employers' group. But he and Mr. Baxter opposed any contractual provision designed to eliminate the brokers and each of them believes that such a provision would be illegal and was wrong in principle. The broker situation was discussed by all members of the committee. Some persons, he believes, made the statement that the brokers were a bad influence and detrimental to the business. Some of the negotiators felt that the brokers could purchase a cheap truck and furnish 'just that much more competition in the field.' He was opposed throughout the negotiations to any contractual provision eliminating brokers or which would adversely affect them, and so stated to his own committee as well as in the joint meetings of the two committees; some members of the employers' committee agreed with him and others did not. He would say that Jones did not agree with him, but that Messrs. Baxter and Trsek agreed with him. After the contract containing Article 34 was finally negotiated, a copy was presented to him by the Union. He then sent the contract to his Home Office and, upon its return, finding that certain other dairies had signed it, he finally signed the agreement believing that it was necessary to do so if he did not want to get into any trouble about it." (R. 398 to 413.)

12—Sixth line from the bottom—change the sentence beginning in that line to read: "The milk is delivered to brokers in bottles of the company bearing the company's cap, but some bottles are of the universal type." (R. 792.)

13—Change the testimony of C. L. Dilts on cross examination contained on this page to read: "His company has its own wholesale customers (i.e. stores, restaurants, hotels, etc.) and delivers to these customers through drivers employed by it and operating its wagons, and sells the rest of its milk to brokers who deliver it in the same bottles, bearing the same caps and in wagons bearing the Fairmont name. The company's responsibility with reference to milk sold to brokers ends at the com-

pany's delivery platform. (R. 796 and 797.) The dairies' committee had no authority to obligate anyone. It was formed for the purpose of negotiating an employment agreement which would be fair to both sides, and, having done so, to submit such an agreement with its recommendation to the distributors in the city, or to recommend the contract as being the best it could obtain. (R. 798.) The witness remembers that a strike ultimatum was made by the Union; that the Union stood pat; but his committee never took the position of not being willing to continue negotiations. He believes that a strike was called to be effective on October 11th, and recalls that his committee established headquarters at the Statler Hotel and met on October 9th and October 10th. The question of wages was an important issue, and remained undecided at the time of the call of the strike. The Union wanted a weekly wage, but the employers demanded, and had insisted for years, upon the pay being based principally upon a commission. (R. 804.) Mr. Corrigan came into the negotiations on October 10th and persuaded the Union to resume negotiations. (R. 805.) The two committees then went over the contract to ascertain the matters which were not in dispute. Quite a number of matters were in dispute, the matter of pay being the crux of the issue. (R. 806.) Corrigan requested an examination of the dealers' books. The witness had to get permission for such an examination from his home office. (R. 807.) And other members of the committee believed they had to submit that question to the dairies. Negotiations started anew, first on inconsequential matters as to which there was no disagreement. The committees worked from October 11th to October 21st, and then took the agreement back to the dairies as the best they could do. The contract was later mailed to him and then sent to his home office and was thereafter returned to him. Mr. Dilts always objected to the provision whereby all delivery of dairy products of his company had to be through members of the

Union, because he knew that, by reason thereof, he could not make delivery to brokers. He opposed this provision in committee meetings and spoke against it on many occasions. Upon the return of the contract from his home office he signed it because he believed that otherwise there might have been a strike. The Union was the one which made the demand that, if its members were to work on a commission basis, its members must deliver all of the employers' milk." (R. 815.)

14—Fourth line—change to read: "Some of the bigger dairies which did not sell to brokers and so would not be affected by their elimination, did not favor Articles 31 and 34 of the contract, but did not make a very strong opposition thereto." (R. 824.)

Eleventh line from the bottom—change to read: "He recalls that several contracts were framed during the negotiations, but the finished contract * * *." (R. 418.)

Insert after the sentence ending on the fourth line from the bottom the following: "Some of the dealers were and still are dissatisfied with the contract and discussed it among themselves." (R. 420.)

15—Sixth line from the bottom—change to read: "was sent to the milk dealers to meet at the Statler Hotel to see if they could not negotiate a different kind of contract than the one submitted by the Union." (R. 431.) Omit the words "for acceptance of the contract as an industry."

18—Last line of Mr. Manfredi's cross examination by Mr. Corrigan—change to read: "farmers or Cooperative milk companies." (R. 450.)

Fifth line of Mr. Manfredi's cross examination by Mr. Miller—insert after "Cleveland" the following: "but there would still be some dealers selling below others and you could never get an established price. To do so would be illegal." (R. 451.)

19—First line of cross examination by Mr. Corrigan to read: "Witness claims to have no contract with the Union and can but would not sell to brokers.

Witness compares the broker to an ambulance-chasing lawyer, since they go out and steal business." (R. 454 and 455.)

23—Third from bottom line of cross examination of Harry Townsend by Mr. Corrigan—insert: "who deliver the same kind of milk and in the same kind of bottles as are sold to brokers." (R. 491.)

24—Third from bottom line of cross examination of Jacob Simon by Mr. Corrigan—change "1935" to "1939." (R. 511.)

26—In the fourteenth line from the top insert the following sentence: "The Union is not stopping the broker, but was asking the employers who are doing business with the Union to employ union men to deliver their product." (R. 531.)

Change the portion on page 26 beginning "The brokers cannot get a supply of milk * * *" down to "the men would have to work for wages," and substitute the following: "The witness claims that the Union's demand would not eliminate the broker since the broker can buy from a non-union dairy. The Union does not have a contract with substantially every dealer or dairy in Cleveland." (R. 533 and 536.) The Union wanted the broker to work under wages and hours provisions, the same as the rest of the union membership and do work under the same conditions. In order for Simon of the Clover Leaf Dairy Company to keep his brokers, he would have to put the men into the Union. The men would have to work for wages to join the Union." (R. 533 to 536.)

27—Eliminate the portion beginning on the fourteenth line from the bottom as follows: "Witness states * * *" down to the second line from the bottom "obtaining equal pay for the employee" and substitute therefor the following: "The Union had a lad at the meetings taking notes for it. (R. 540.) The Union fought for Articles 1 and 34 right along. After numerous meetings, the employers and employees were deadlocked, and Mr. Corrigan entered the proceedings and started from scratch to make an agreement. They advised Mr. Corrigan

that the Union wanted a closed shop and the right to deliver all the milk. The question of legality was referred to Mr. Corrigan, but the witness does not know who raised this question. (R. 545-6.) Brokers do not sell as cheaply as some dealers. (R. 547, 550 and 553.) Advertising is an item of cost entering into the price of milk. The broker is a competitor of the dairy and of the union driver. (R. 549.) The witness does not know who establishes the price of milk in Cleveland, but thinks that the newspapers establish the only recognized price. There is, however, no regularity in price, and no two dealers have the same cost. (R. 551 and 552.) The elimination of the broker as a help to the dairies was not discussed during the negotiations. The main topic of discussion concerned the closed shop and wages and obtaining equal pay for the employees." (R. 555.)

28—Ninth line from the top—insert the following: "The respondent Union's Exhibit A was the contract drafted by the Union and presented to the dairies prior to the negotiations. (R. 558.) Articles 1 and 34 of the final contract were drafted during the negotiations (R. 560), and are the two articles which pertain to brokers."

Eliminate the sentence immediately before Mr. Seckler's cross examination which reads: "Witness gives it as his interpretation * * * would be eliminated," and substitute therefor: "The brokers are not eligible to join the Union since they are not working for wages. The big argument in the negotiations was that the Union wanted all the work from employers for its members." (R. 565, *et seq.*)

Insert the following after the word "contract" in the tenth line from the bottom: "after sending notice of its election to terminate the existing employment contract on September 30, 1937, the Union sent out a form of contract, which is the Union's Exhibit A, to all employers, this being the contract which the Union demanded." (R. 567.)

After the word "milk," in the fifth line from the bottom, insert: "This was the big argument all the way through." (R. 569.)

In the third line from the bottom insert the following: "The Union originally demanded a check-off, but the present contract contains no provision therefor. The Union had also been fighting for years for a closed shop." (R. 570.)

Add at the end of Mr. Seckler's cross examination: "All members of the Union Committee had insisted upon Article 34. Mr. Corrigan, attorney for the Union, emphasized this demand." (R. 573.)

30—Change the last sentence of Mr. McElroy's cross examination to read: "He does not now wear the uniform or cap of the Old Valley Dairy, but used to do so." (R. 618.)

32—First sentence of cross examination of John T. Bocan should read: "His wagon bears the name and color scheme of the Hillside Dairy, and he has increased his customers from thirty-five to two hundred seventy-five." (R. 836.)

In the last sentence of Mr. Bocan's cross examination change the word "permits" to "merely provides that." (R. 841.)

Last line on this page to read: "Trucks carry the Hridel sign on them in big letters and his name on the door of the truck in little letters." (R. 854.)

33—Change the sentence beginning on the second line of this page to read: "His trucks are cream and red, Hridel's trucks are now cream and black, but used to be the same color as his; the new truck which the witness has bought is the same color as the present Hridel trucks." (R. 855.)

Add the following to the direct examination of Norman Wolf: "In two years he has increased his customers from twelve to one hundred seventy-five. He meets and competes with drivers for various dairies." (R. 875 and 876.)

153—Bottom of page—add the following: "The Union would not be a party to, nor let itself be used as an instrument whereby any dealer could force a

broker to sell out, but instead the Union would do everything to secure an equitable adjustment." (R. 954 and 955.)

We have, for convenience, indicated pages of the transcript of evidence which we believe demonstrate that the amendments suggested accurately conform to the evidence given. We reiterate, however, that, as was found by the Court of Appeals, the only question presented by this case is a question of fact; namely, the primary purpose of the respondents in negotiating and entering into the employment contract. The petitioners claim that that purpose was an unlawful one of driving the petitioners from business, and that discussions of all other matters were merely a camouflage to conceal the true objective. The respondents claim instead that the primary purpose and chief objective of the negotiators was to adjust a valid and sincere labor controversy. While it may be that discussions of starting times, rights to discharge employees for certain wrongs, wages of plant employees, allocation of routes and similar matters have no direct bearing upon the petitioners, such discussions as well as the length of time devoted to discussions of these matters indicate clearly that the respondents were sincerely and vitally interested in these and many other items entering into the employment contract, and were not spending their time in acting in the manner in which they did in a mere attempt to camouflage their chief objective. Certainly, in the absence of evidence to the contrary, it will not be presumed that a group of fifteen or twenty reputable men spent weeks in discussing and negotiating various items of an employment contract containing nearly forty sections in a mere attempt to hide and conceal their chief objective which forms the subject matter of only one or two paragraphs. Consequently, the whole situation can be more accurately ascertained by an examination of the Exhibits 5-A to 5-U which contain verbatim everything which was said by the representatives of labor and of the

employers in formulating and negotiating the contract in question. The petitioners examined these Exhibits and read therefrom into the transcript of testimony only those excerpts which they believed had a direct effect upon them, and then, as true advocates, probably chose those portions considered to support their claims. In spite of this, however, we believe that even the excerpts so chosen by the petitioners will refute their contentions and establish that the respondents acted for the purpose of accomplishing a lawful object through the use of lawful means.

Respectfully submitted,

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